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6                          IN THE UNITED STATES DISTRICT COURT  
7                          FOR THE EASTERN DISTRICT OF WASHINGTON

8                          JEREMY OLSEN,

9                          Plaintiff,

10                         v.

11                         XAVIER BECERRA, in his official  
12                         capacity as Secretary of the United  
13                         States Department of Health and  
14                         Human Services,

15                         Defendant

16                         No. 2:21-cv-00326-SMJ

17                         SUR-REPLY RE: MOTION  
18                         FOR PRELIMINARY  
19                         INJUNCTION

1       The gist of the Secretary's filing of March 12, 2022, (*see* Dkt. #27),<sup>1</sup> is:  
2           1) the Secretary had a plan where he could continue engaging in bad faith  
3           conduct (while simultaneously avoiding or delaying judicial review) but he was  
4           incompetent to execute the plan (and, therefore, has not really engaged in bad  
5           faith); and  
6           2) when the Secretary subjects people to financial liability by denying  
7           claims, the Secretary would prefer if that is not referred to as "rejecting" claims.  
8           Neither of these has any affect on the pending motion for a preliminary  
9           injunction.

10           **The Secretary's Plan to Continue to Engage in Bad Faith**

11           As offered by the Secretary and shown in the attached exhibits, the  
12 decisions of five District Courts describing the Secretary's CGM policy as  
13 "unreasonable", "arbitrary and capricious", "no evidence supports", "no  
14

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15           <sup>1</sup> The Secretary's paper includes as exhibits materials that are not part of  
16 the Administrative Record and were not previously communicated to Mr.  
17 Olsen. Accordingly, Mr. Olsen objects to consideration of these materials  
18 pursuant to 42 U.S.C. § 405(g). Mr. Olsen also notes that a complete copy  
19 of the Record still has not been filed with this Court, thereby preventing  
20 Olsen from moving for summary judgment.

1 reasonable person would be satisfied by, and “no reasonable basis” did not  
2 phase the Secretary in the slightest. That the Secretary had been ordered to pay  
3 attorney’s fees four times also did not phase him. In the Secretary’s telling, he  
4 promptly reacted to this Court’s “bad faith” finding by – continuing to reject  
5 CGM claims on the bad faith grounds. After three months, the Secretary  
6 implemented a plan he has to continue to engage in the bad faith conduct, while  
7 shielding himself from/delaying judicial review.

8 The plan is this: when a court rejects his bad faith position, the Secretary  
9 re-programs his computer systems so that only claims submitted by the plaintiff  
10 in that case are paid, while everybody else’s CGM claims continue to be  
11 rejected on the bad faith grounds. *See Dkt. #28, Exhibit B - December 22, 2021*  
12 email from Connie Modahl (“I did this because the VMS system is hard coded  
13 to deny this HCPCS A9276. This code is non-covered; however, we have been  
14 instructed in certain cases to pay this code when CMS advises us due to a court  
15 order.”).

16 In Mr. Olsen’s case, the plan was triggered by a July 13, 2021, email  
17 from Pamela Durbin. *See Dkt. #28, Exhibit A - July 13, 2021 email from*  
18 Pamela Durbin (“Please pay the claims as soon as possible and implement a  
19 system to pay all CGM-related claims *for this beneficiary going forward.*”)  
20 (emphasis added).

1       One problem - the Secretary was not competent to execute the plan and  
2 Mr. Olsen's claims kept getting rejected on the bad faith grounds. *See* Dkt. #28,  
3 Exhibit B - December 22, 2021, email from Connie Modahl ("The claims  
4 associate should have changed the code to a 'not otherwise classified' code to  
5 allow it to be manually allowed and processed. Unfortunately, she did not  
6 change the code, and the system denied the claim. The associate has been re-  
7 educated on the need to change the code *in this unique situation.*") (emphasis  
8 added). Thus, the plan did not work. The Secretary seems to think that this  
9 course of conduct is somehow redeeming.

10       Instead, the conduct demonstrates that the Secretary does not  
11 understand what an award of attorney's fees (especially through a "bad  
12 faith" finding) is intended to accomplish. "The clearly stated objective of  
13 the EAJA is to eliminate financial disincentives for those who would defend  
14 against unjustified governmental action *and thereby deter the unreasonable*  
15 *exercise of Government authority.*" *See Ardestani v. I.N.S.*, 502 U.S. 129,  
16 138 (1991) (emphasis added). Moreover, EAJA:

17       [R]ests of the premise that a party who chooses to litigate an  
18 issue against the Government is not only representing his or her  
19 own vested interest but is also refining and formulating public  
20 policy. An adjudication or civil action provides a concrete,  
adversarial test of Government regulations and thereby insures  
the legitimacy and fairness of the law.

1     *See Ibrahim v. D.H.S.*, 912 F.3d 1147, 1178 (9<sup>th</sup> Cir. 2019) (*en banc*) (cleaned  
 2 up).

3                 Here, rather than change his bad faith conduct, the Secretary thought he  
 4 had a plan to continue it and avoid/delay judicial review but he was not  
 5 competent to execute it. Again, Mr. Olsen does not see how any of this  
 6 improves the Secretary’s position.

7                      **The Secretary’s Objection to the Word “Reject”**

8                 In his papers, Mr. Olsen showed that his claims continue to be denied on  
 9 the bad faith grounds including in a denial he received on January 6, 2022. Mr.  
 10 Olsen described these as “rejections.” Though the denials are outstanding and  
 11 Mr. Olsen continues to receive them, the Secretary says these claims were not  
 12 “rejected” because the Secretary has some internal emails where they  
 13 simultaneously tried to pay them. *See* Dkt. #27 at 2. At a minimum, this means  
 14 that Mr. Olsen is subject to recoupment from the Secretary. *See* 42 C.F.R. §  
 15 405.352. In fact, this situation is exactly what is described in the Complaint.  
 16 *See* Dkt. #1 at ¶¶ 76-78. The Secretary’s quibble with the word “reject” has no  
 17 merit.

18                      **CONCLUSION**

19                 For the reasons set forth above, this Court should enter an injunction as  
 20 requested.

1           Respectfully submitted this 16th day of March, 2022.

2  
3           PARRISH LAW OFFICES

4           By: /s/ James C. Pistorino

5           James C. Pistorino

6           Pro Hac Vice

7  
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16  
17           *Attorneys for Plaintiff*

## **CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury under the laws of the state of Washington that on the date below, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

Vanessa R. Waldref  
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DATED this 1<sup>st</sup> day of March, 2022, at Seattle, Washington.

s/ Julia Wolfe  
Julia Wolfe, Legal Assistant